

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

JENNIE B. SHAUGHNESSY,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.  
(CSF 1 733 650)

DOCKET NUMBER  
AT08318810437

DATE: FEB 26 1990

Daniel D. Mahn, Esquire, Hewlett, Collins, & Mahn,  
Wilmington, North Carolina, for the appellant.

John E. Landers, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of the initial decision issued on August 11, 1988, that sustained the Office of Personnel Management's (OPM) reconsideration decision denying her claim for a survivor annuity. The Board DENIES the appellant's petition for review because it fails to meet the Board's criteria for review under 5 C.F.R. § 1201.115. However, pursuant to its authority under 5 U.S.C. § 7701(e)(1)(B), the Board REOPENS this appeal on its own

motion and AFFIRMS the initial decision as MODIFIED by this Opinion and Order.

#### BACKGROUND

The appellant is the widow of James Shaughnessy, a former Federal employee who retired on June 30, 1972. At the time of his retirement, Mr. Shaughnessy was married to Marie Shaughnessy, and he elected a reduced annuity in order to provide survivor benefits for her. He divorced Marie in 1981, and OPM subsequently determined to be invalid a provision of the divorce settlement in which the appellant had agreed to retain the survivor annuity benefit for Marie Shaughnessy after the divorce. Mr. Shaughnessy married the appellant on October 17, 1984. OPM sent several notices to Mr. Shaughnessy telling him how to elect a survivor annuity for a new spouse and advising him of the applicable 1-year time limit for making such an election. By notice dated October 15, 1985, OPM acknowledged that it had received correspondence stating that Mr. Shaughnessy had remarried. OPM further advised him that his wife could not make the election for him and requested that he confirm that he wished to provide survivor benefits for the appellant. On October 22, 1985, the appellant advised OPM that Mr. Shaughnessy refused to fill out the forms because "he gave everything to Marie." See OPM File, Tab 6. On October 10, 1987, Mr. Shaughnessy died without having designated a survivor annuity for the appellant.

OPM paid the appellant a lump-sum death benefit, but it denied her application for a survivor annuity because Mr. Shaughnessy had not elected within 1 year following his remarriage to provide a survivor annuity for the appellant. See 5 U.S.C. § 8339(j)(1); OPM File, Tabs 2 and 4. In her appeal to the Board, the appellant claimed that Mr. Shaughnessy was not competent to make an election during the pertinent period due to mental illness.

In an initial decision issued on the basis of the written record, the administrative judge found that Mr. Shaughnessy was suffering from mental illness during the 1-year period for the election of survivor annuity benefits, and thereafter until his death.<sup>1</sup> See Initial Decision (I.D.) at 3-6. The administrative judge further found that Mr. Shaughnessy's mental illness was sufficiently severe to render him incompetent to make a rational election to provide a survivor annuity for his post-retirement spouse. *Id.* at 6. The administrative judge also concluded that, because Mr. Shaughnessy had elected a survivor annuity for his first wife at the time of his retirement, he would have, but for his mental illness, elected a survivor annuity for the appellant. *Id.*

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<sup>1</sup> The administrative judge's finding was based on medical documentation submitted by the appellant, including evidence that Mr. Shaughnessy was involuntarily committed in 1984, that he was seen on 19 occasions at a mental health clinic, and that he was diagnosed by his psychiatrist as suffering from dementia. See Initial Appeal File, Tab 7.

Based on his determination that Mr. Shaughnessy was incapable of making the survivor annuity election, the administrative judge proceeded to consider whether the appellant could make the election on behalf of her late husband.<sup>2</sup> Finding no provision in the civil service law or regulations authorizing OPM to appoint a guardian or to make the election for an incompetent annuitant, the administrative judge applied the law of North Carolina, the state of residence of Mr. Shaughnessy and the appellant, to determine the appellant's status on this issue. He found that: (1) The proper procedure under state law for appointment of a guardian had not been followed, *id.* at 7; (2) neither Mr. Shaughnessy nor a court-appointed guardian had elected a survivor annuity for the appellant; and (3) the appellant was not entitled to make the election. *Id.* at 8. The administrative judge concluded that the Board had no authority to waive the statutory election requirement. *Id.*

#### PETITION FOR REVIEW

In her timely petition for review, the appellant continues to argue that she is entitled to a survivor annuity despite Mr. Shaughnessy's failure to elect one for her. In this regard, she contends that Mr. Shaughnessy's

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<sup>2</sup> The appellant never, in fact, made nor attempted to make an election on her husband's behalf. She did, however, ask in her October 22, 1985, letter to OPM whether "I [would] get anything after his death...." See OPM File, Tab 5.

failure to make the election should not be given effect because of his mental status at the time in question. The appellant further argues that OPM, aware of Mr. Shaughnessy's mental condition, should have notified the appellant of the need to have a guardian appointed, and that, based on North Carolina law, she was the person eligible to receive payment on Mr. Shaughnessy's behalf. OPM has not responded to the petition for review.

#### ANALYSIS

The appellant's entitlement to a survivor annuity must be determined by reference to the statute and regulations governing this benefit. See *Zucker v. United States*, 758 F.2d 637, 640 (Fed. Cir.), cert. denied, 474 U.S. 842 (1985). Under 5 U.S.C. § 8339(j)(1), an election of a survivor annuity must be made "in a signed writing received in the Office [of Personnel Management] within 1 year" after remarriage. The appellant would have the Board inject into the statute an exception for mentally incompetent persons that would have the effect of excusing their failure to comply with the statutory provision. However, the statute provides no such exception, and the Board is bound by the clear language of the statute. See *LaRochelle v. Office of Personnel Management*, 774 F.2d 1079, 1081 (Fed. Cir. 1985) (the court was without authority to alter the "clear and specific" requirement of 5 U.S.C. § 8339(k)(2) that an election of a survivor annuity under the statute be

"received" by OPM "within 1 year after" the retiree married); *Harris v. Office of Personnel Management*, 37 M.S.P.R. 293, 298 (1988), *aff'd in part and rev'd in part on other grounds*, 888 F.2d 121 (Fed. Cir. 1989). See also *Adair v. Office of Personnel Management*, 28 M.S.P.R. 448, 450 (1985).

We contrast the statute here at issue, 5 U.S.C. § 8339(j)(1), with 5 U.S.C. § 8337(b), which states that a claim for disability retirement may be allowed only if the application is filed with OPM before the employee is separated from service or within 1 year thereafter. The statute further provides that the time limit may be waived in the case of an employee who is mentally incompetent. The court and the Board have applied the statutory exception of Section 8337(b) and granted waivers under appropriate circumstances. See *French v. Office of Personnel Management*, 810 F.2d 1118, 1120, *reh'g & reh'g en banc denied*, 823 F.2d 489 (Fed. Cir. 1987); *Bridges v. Office of Personnel Management*, 37 M.S.P.R. 290, 292-93 (1988). However, 5 U.S.C. § 8339(j)(1) does not contain a provision that the 1-year time limit for making an election of a survivor annuity may be waived in the case of an employee who is mentally incompetent.

We, therefore, agree with the administrative judge that, in the absence of an exception for mental incompetence, Mr. Shaughnessy's mental state during the 1-year period for making the election for a survivor annuity

did not absolve him of the requirement to comply with the law, and cannot, in the absence of an election, serve as a basis to award the appellant a survivor annuity.<sup>3</sup>

The appellant contends that OPM became aware of Mr. Shaughnessy's mental condition in August 1985, when it received a brief memorandum from his psychiatrist, Boyd Bresnahan, M.D., which stated, "This patient is ill with dementia and requires extensive home supervision for his medical problems. His wife is supervising his care and tending to his basic needs." See Initial Appeal File, Tab 7. The appellant argues that when OPM received this information prior to the expiration of the 1-year period for Mr. Shaughnessy to elect a survivor annuity, it should have notified the appellant regarding the importance of having a guardian appointed to make the necessary election for him. Assuming that OPM did receive the psychiatrist's

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<sup>3</sup> We distinguish this case from *Pooler v. Office of Personnel Management*, 23 M.S.P.R. 51, 53-4 (1984), wherein the Board invalidated a retiree's election of a life annuity (one not providing a survivor benefit) when there was preponderant evidence of his mental incapacity from retirement until his death. The Board held that an election is only valid when made by a mentally competent individual. *Id.* at 53. In the instant case, however, the decedent did not take the affirmative step of making an election, so there is no action for the Board to void. Additionally, unlike the situation in *Pooler*, since Mr. Shaughnessy married the appellant after October 1, 1978, the statute does not provide for an automatic survivor annuity for her absent an election to the contrary. See OPM File, Tab 6; 5 U.S.C. § 8339 note, Pub. L. No. 95-317, § 4, 92 Stat. 382 (1978).

memorandum,<sup>4</sup> we need not decide whether it created an obligation on OPM's part, derived from any law, rule, or regulation, to so advise the appellant. Dr. Bresnahan's assessment of Mr. Shaughnessy's condition constitutes a medical opinion, but is not, contrary to the appellant's claim, a formal certification of Mr. Shaughnessy's incompetence. We note, additionally, that the appellant never requested of OPM that she be provided with information concerning the appointment of a guardian for her husband. Accordingly, we need not decide under the circumstances of this case whether a guardian could exercise an annuitant's right to provide for a survivor annuity for a new spouse and, if so, whether OPM had a duty to advise the appellant of the importance of having a guardian appointed for Mr. Shaughnessy.

We reopen this case to address the appellant's contention that, under North Carolina law, she should have received payment on Mr. Shaughnessy's behalf. In his discussion of the guardian issue, the administrative judge relied on 5 U.S.C. § 8345(e) to apply North Carolina law, concluding that only Mr. Shaughnessy or a court-appointed guardian could have made the election for a survivor annuity, that neither did so in this case, and that the appellant was without authority to make the election on her husband's behalf. See I.D. at 7. We find that the

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<sup>4</sup> This memorandum does not appear in OPM's reconsideration file, and OPM has neither admitted nor denied having received it.



administrative judge's reliance on § 8345(e) was erroneous, and that, therefore, North Carolina law is not dispositive of the issues before the Board.

The cited subsection, 5 U.S.C. § 8345(e), states:

Payment due a minor, or an individual mentally incompetent or under other legal disability, may be made to the person who is constituted guardian or other fiduciary by the law of the State of residence of the claimant or is otherwise legally vested with the care of the claimant or his estate. If a guardian or other fiduciary of the individual under legal disability has not been appointed under the law of the State of residence of the claimant, payment may be made to any person who, in the judgment of the Office [of Personnel Management], is responsible for the care of the claimant, and the payment bars recovery by any other person.

The clear purpose of this section is to assure that payment of a survivor annuity on behalf of a minor or a mental incompetent inures directly to the benefit of that individual. See *Brown v. Office of Personnel Management*, 33 M.S.P.R. 339, 342 (1987). Thus, it has no relevance to the instant case which concerns whether the 1-year deadline for electing a survivor annuity following an annuitant's remarriage under 5 U.S.C. § 8339(j)(1) can be extended for a mentally incompetent annuitant and whether OPM became aware of Mr. Shaughnessy's alleged mental incompetence in August 1985, assuming that OPM received the brief memorandum from Dr. Bresnahan that assessed Mr. Shaughnessy's medical condition.

Accordingly, we conclude that the appellant has not carried her burden of proving entitlement to a survivor

annuity. See *Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140-41 (Fed. Cir. 1986) (the burden of proving entitlement to a survivor annuity is on the applicant for benefits), cert. denied, 479 U.S. 1037 (1987).

ORDER

This is the Board's final order in this appeal. See 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT


You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

OR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board